No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY & LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATE RESPONDENTS

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QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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INTRODUCTION

"'[P]eople will perceive their own best interests if only they are well enough informed.'" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011). That principle is especially pertinent in matters of healthcare, where "'information is power,'" and increased knowledge leads to "'better decisions.'" *Id.* (quoting physician's statement). It applies with urgency when patients must make timely, important, and sometimes difficult decisions affecting matters of life, health, and intimate liberty, as women must when they are pregnant. And it is crucial when a low-income woman's unplanned pregnancy presents her with new and pressing medical needs that her finances do not enable her to fulfill on her own.

A woman who seeks advice and care during pregnancy needs certain basic information to make informed decisions and obtain appropriate, timely medical care. When she is offered assistance by a facility that provides pregnancy-related services of a type the public may associate with medical clinics, she needs to know whether the entity she is dealing with is in fact a state-licensed clinic staffed with regulated professionals. And when she visits a state-licensed clinic that caters to those not covered by private insurance or already enrolled in public programs and provides less than the full spectrum of relevant healthcare, she needs to know that there are state resources available to access additional care if she wishes to do so.

To address these needs, California requires unlicensed facilities that primarily serve pregnant women and have characteristics associated with licensed medical clinics to provide clients with a one-sentence disclosure of their unlicensed status. And the State requires licensed medical clinics that primarily offer

pregnancy or family-planning care to provide, in one of various ways, a two-sentence notice stating the existence of, and providing a phone number to obtain information about eligibility for, state-funded programs offering a full range of free and low-cost reproductive healthcare services to eligible women.

California enacted these requirements in light of an unquestioned medical consensus on the benefits of early medical care for those who are or seek to become pregnant; the reality that abortion, for those who choose it, is optimally conducted earlier rather than later; and evidence that many women are unable to pay for comprehensive care themselves, are unaware of available state-funded comprehensive options, and are being misled by the actions of limited-service pregnancy centers. The statute does not require anyone to provide information on, or refer any client for, abortion, contraception, or any other medical option. It simply imposes a carefully drawn, neutral disclosure requirement on entities that deal with a specific population likely to need particular information at a critical moment, ensuring that women will have the information they need to seek the care and services they deem appropriate.

STATEMENT

1. a. About 700,000 California women become pregnant each year. Pet. App. 76a-77a. California has long prioritized "comprehensive perinatal care," including "prenatal care, delivery service, postpartum care, and neonatal and infant care," as "necessary services that have been demonstrated effective in preventing or reducing maternal, perinatal, and infant mortality and morbidity." Cal. Health & Safety Code

§ 123475.[1] The legislative record of the Reproductive FACT Act, Cal. Health & Safety Code § 123470 et seq., reflects findings that medical care early in pregnancy is of the utmost importance, and that pregnancy requires decisions that are "time sensitive." Pet. App. 77a.

Petitioners do not appear to contest these basic legislative judgments, which are, in any event, supported by medical evidence. The majority of women carry their pregnancies to term.[2] For them, delayed or forgone medical care increases the risk of maternal death, preterm delivery, low birth weight, and congenital birth defects.[3] Indeed, optimal outcomes call for preconception care, which provides the circumstances in which an intended pregnancy can flourish and reduces the chance of unintended pregnancies.[4] For women who choose to terminate their pregnancies, early care is also important, because late abortions may be less safe, less desirable, and more burdensome to obtain than those that occur early in a pregnancy.[5] And for

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[1] Unless otherwise specified, statutory citations in this brief are to the California Health & Safety Code.

[2] *See* Guttmacher Institute, State Facts About Abortion: California (2018), https://www.guttmacher.org/sites/default/files/fact-sheet/sfaa-ca.pdf.

[3] *See* Smith & Bassett-Novoa, Late Presentation to Prenatal Care, 92 Am. Family Physician 395, 395 (2015).

[4] *See* Lu, Recommendations for Preconception Care, 76 Am. Family Physician 397, 398 (2007).

[5] *See* Zane, et al., Abortion-Related Mortality in the United States, 126 Obstetrics & Gynecology 258, 263-264 (2015) (noting that although later abortions involve low complication rates, the rates are noticeably higher than for earlier abortions); *Gonzales v. Carhart*, 550 U.S. 124, 134-140 (2007) (discussing abortion methods at various points in a pregnancy); Guzik, Even in Blue-State California, Abortions Can Be Hard To Find, Rewire (May

women who are still in the process of deciding whether to carry their pregnancy to term or whether to receive an abortion, early medical care can ensure that the decision they make is an informed one, and that whichever outcome they choose, they do not suffer unnecessary consequences due to misunderstandings or delay.

Almost half of California pregnancies are unintended. Pet. App. 76a. Those women are especially likely to experience delays in care, especially if they are poor.[6] California thus makes a variety of pregnancy care and family-planning services immediately available to women who cannot afford care on their own. Medi-Cal and the Medi-Cal Access program provide free or low-cost prenatal and delivery care for qualifying patients, and allow applicants to receive those services while their applications are pending review.[7] The Medi-Cal Family Planning, Access, Care and Treatment (F-PACT) program provides family

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24, 2017), https://rewire.news/article/2017/05/24/blue-state-california-abortions-hard-to-find/ (discussing unavailability of late pre-viability abortions in parts of California); Cal. Health & Safety Code § 123468(b) (prohibiting most post-viability abortions).

[6] *See* Cheng, et al, Unintended Pregnancy and Associated Maternal Preconception, Prenatal and Postpartum Behaviors, 79 Contraception 194, 196 (2009) (women with unwanted or mistimed pregnancies are more likely to delay prenatal care); Nothnagle, et al., Risk Factors for Late or No Prenatal Care Following Medicaid Expansions in California, 4 Maternal & Child Health J. 251, 254 (2000) (low-income women are more likely to receive late or no prenatal care).

[7] *See* Cal. Dep't of Health Care Svcs., Medi-Cal Access Program, Important Information for Pregnant Applicants (June 26, 2015), http://mcap.dhcs.ca.gov/My_MCAP/Important_Information_Applicants.aspx.

planning assistance (including medical methods and abstinence and fertility-awareness counseling), limited infertility services, sexually transmitted infection testing and treatment, cancer screening, and preconception counseling, with F-PACT providers able to determine eligibility and enroll patients on-site.[8] And for women who choose to terminate a pregnancy, Medi-Cal covers abortion care.[9]

Despite "statewide marketing campaigns, community mobilization, provider training, and targeted efforts to reach vulnerable populations who may be newly eligible for coverage," many eligible Californians do not know about their publicly funded healthcare options.[10] Of special pertinence to the Legislature's efforts to provide early care for pregnant women, each year thousands of women are unaware of

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[8] *See* Cal. Dep't of Health Care Svcs., What Does Family PACT Cover? (Aug. 9, 2017), http://www.familypact.org/Get%20Covered/what-does-family-pact-cover; Cal. Dep't of Health Care Svcs., Eligibility Criteria (May 2, 2016), http://www.familypact.org/Get%20Covered/client-eligibility-enrollment/eligibility-criteria; Cal. Dep't of Health Care Svcs., Family PACT Program Standards at 5-12 (Jan. 2018), http://files.medical.ca.gov/pubsdoco/publications/masters-mtp/fpact/progstand_f00.doc.

[9] *See Comm. to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 258 (1981).

[10] Kaiser Family Foundation, The California Health Care Landscape, at 6 (Aug. 26, 2015), http://files.kff.org/attachment/fact-sheet-the-california-health-care-landscape; Pet. App. 76a-77a; *see* Becker, Number of Uninsured in California Remained at Record Low in 2016, UCLA Ctr. for Health Policy Research, at 3 (Oct. 2017), http://healthpolicy.ucla.edu/publications/Documents/PDF/2017/uninsured-factsheet-oct2017.pdf (estimating that 11% of California's 2.8 million uninsured are income-eligible for Medi-Cal and another 22% are income-eligible for Covered California subsidies).

relevant public health programs when they learn that they are pregnant. J.A. 57. A woman's ability to learn about and obtain needed medical services in such circumstances may be especially limited if she is low-income, since such women are likely to have limited time and money for travel, may have difficulty attending multiple appointments, may be ill-equipped to research options, and will find it difficult to pay for services.[11]

b. Informational challenges for low-income women may be heightened by the activities of limited-service centers that actively seek out women with unplanned pregnancies but either do not provide medical care at all or provide only limited types of care and advice. Some women may go to such centers with full knowledge of what will be provided and find exactly the non-medical services, religious or ethical counseling, or limited types of medical care that they are looking for. Others, however, may arrive at such centers misunderstanding what they do and do not provide, or erroneously believing that they are the only option for those unable to afford comprehensive care on their own.

Such misunderstandings can be exacerbated by the attributes and actions of the centers themselves. Some centers that have no medical professionals and offer no medical services nevertheless outwardly resemble medical institutions—for instance, by using lab coats, forms, and office spaces resembling those at medical clinics, and by providing services such as ultrasounds and pregnancy testing.[12] Some facilities

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[11] *See, e.g.*, Braveman, et al., Barriers to Timely Prenatal Care Among Women with Insurance: The Importance of Prepregnancy Factors, 95 Obstetrics & Gynecology 874, 874 (2000).

[12] NARAL Pro-Choice America, Crisis Pregnancy Centers Lie

may be licensed medical clinics whose names and advertising imply that they will provide comprehensive reproductive healthcare, but which in fact provide only limited services and incomplete medical advice selected to "prevent women from accessing abortions." J.A. 39-40.[13] Staff and volunteers may achieve that goal by conveying information that is medically or legally false, or distracting women who ask questions that the center prefers not to answer.[14] As the Legislature heard, the result can be to delay or thwart women's ability to receive the medical care and truthful information they seek—as evidenced by physician testimony about patients whose serious health issues

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(2015), at 15 (NARAL Report), https://www.prochoiceamerica.org/wp-content/uploads/2017/04/cpc-report-2015.pdf; *id.* at 7 ("Volunteers who are not licensed medical providers may wear lab coats and require clients to complete paperwork prior to seeing a so-called counselor."); J.A. 40 (discussing NARAL Report); *see also* FDA, Consumer Update: Avoid Fetal 'Keepsake' Images, Heartbeat Monitors, https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm095508.htm (last updated Dec. 16, 2014).

[13] *See also* Letter from the American Congress of Obstetricians & Gynecologists to Sen. Hernandez, Chair, Senate Health Committee, re A.B. 775 (June 15, 2015), located in A.B. 775 Bill File, Cal. Sen. Comm. on Health (stating that some centers "use false and misleading advertising to appeal to women who think they may be pregnant and are looking for comprehensive reproductive health care"). Bill files, which are maintained by the State Archives, are collections of legislative history that are frequently relied on by California courts to shed light on the legislative intent and concern behind a statute. *See, e.g., Beeman v. Anthem Prescription Mgt., LLC*, 58 Cal. 4th 329, 338 (2013).

[14] *See* J.A. 40; NARAL Report 12 (counselor's statement that abortion is legal "'up to nine months,'" in a state that actually bans abortion after 24 weeks); *id.* (inaccurate information about miscarriage rates).

were overlooked by limited-service facilities, or who received inaccurate information from such facilities.[15]

2. In response, California enacted the Reproductive FACT Act, which establishes two disclosure requirements.

The Unlicensed Facility Disclosure. The Legislature determined that it is important for pregnant women to know whether they are receiving services from a licensed institution and professional, or from somebody who is not subject to the qualification requirements, professionalism guarantees and quality controls that govern licensed healthcare providers. Pet. App. 77a.

The Act therefore defines an "unlicensed covered facility" as an entity which is not licensed by the State and which has no licensed medical provider who provides or supervises the facility's services. § 123471(b). Such a facility is covered if it has a "primary purpose" of "providing pregnancy-related services," and does two or more of the following:

> (1) ... offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women[;]
>
> (2) ... offers pregnancy testing or pregnancy diagnosis[;]

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[15] Sen. Health Comm. Hrg. at 54:16 (June 24, 2015) (statement of Dr. Sally Greenwald, discussing pregnant woman whose diabetes was untreated by crisis pregnancy center, causing significant risk to baby and mother), http://archive-media.granicus.com:443/OnDemand/calchannel/calchannel_7f56b221-8674-4c2b-8eb6-a58a90239170.mp4; *id.* at 56:18 (statement of Dr. Juliana Melo, about patients deceived by non-licensed centers).

> (3) ... advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling[; or]
>
> (4) ... has staff or volunteers who collect health information from clients.

§ 123471(b).

Unlicensed covered facilities must disclose, on site and in any print or digital advertising, that:

> "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."

§ 123472(b). The notice must be in English and "in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located." *Id.* The on-site notice must measure at least 8.5 by 11 inches and appear in 48-point or larger type, and the advertising-material notice must be "clear and conspicuous." § 123472(b)(2), (3).

Violations are punishable by a civil fine of $500 for a first offense or $1,000 for subsequent offenses. § 123473(a). No enforcement proceeding may occur unless the enforcing authority has previously notified the facility of noncompliance and given it 30 days to correct the violation. *Id.*

The Licensed Facility Disclosure. The Legislature also determined that "[t]he most effective way to ensure that women quickly obtain the information and services they need" is to require licensed health care facilities that focus on pregnancy or family planning but are unable to immediately enroll patients into

state-funded full-service programs to advise each patient that such programs exist and to notify patients about how information about eligibility may be accessed. Pet. App. 77a.

A "licensed covered facility" is a clinic licensed under § 1204, which covers "primary care" clinics, "community" clinics, "free" clinics, and "specialty" clinics such as "surgical" clinics and "alternative birth center[s]." *See* §§ 123471(a), 1204. Such a facility is covered if its "primary purpose is providing family planning or pregnancy-related services," and it does two or more of the following:

> (1) ... offers obstetric ultrasounds, obstetric sonograms, or prenatal care...[;]
>
> (2) ... provides, or offers counseling about, contraception or contraceptive methods[;]
>
> (3) ... offers pregnancy testing or pregnancy diagnosis[;]
>
> (4) ... advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling[;]
>
> (5) ... offers abortion services[; or]
>
> (6) ... has staff or volunteers who collect health information from clients.

§ 123471(a).

Clinics that are providers under both the Medi-Cal and F-PACT programs, and which are therefore able to "immediately enroll patients into" each program, J.A. 55, are excluded from the definition of licensed covered facilities. § 123471(c). Also exempted are

clinics that are operated by the federal government. *Id.*

The Act requires licensed covered facilities to provide clients with a two-sentence notice stating that:

> "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."

§ 123472(a)(1).

Clinics may choose how to provide this notice: by including it with other digital notices at the time of check-in or arrival, by posting a sign in the waiting room, or by distributing a printed notice at any time during the visit. § 123472(a)(2). The notice may be given separately or "combined with other mandated disclosures." § 123472(a)(3). It must be provided in English and in the county's "primary threshold languages" for Medi-Cal beneficiaries, as "determined by the State Department of Health Care Services." § 123472(a). For clinics that choose to comply with the statute by distributing a printed notice, the notice must be in 14-point or larger type. § 123472(a)(2)(B). For those that choose to post the notice in the waiting room, the sign must be at least 8.5 inches by 11 inches and written in 22-point or larger font. § 123472(a)(2)(A). Violations are governed by the same penalty provisions that apply to unlicensed covered facilities.

3. Before the Act took effect, the three petitioners in this case challenged the law by suing California's

Governor and Attorney General, the County Counsel for San Diego County, and the City Attorney of El Cajon in the U.S. District Court for the Southern District of California. Pet. App. 84a-85a.

According to its Complaint, the National Institute of Family and Life Advocates is a non-profit organization comprised of both medical and non-medical centers that provide "pro-life information services" to women with unplanned pregnancies. Pet. App. 93a. Fallbrook Pregnancy Center is an unlicensed facility which provides pregnancy test kits, educational programs, and maternity clothes, and which provides ultrasound services through a licensed provider at another location. *Id.* at 92a. And Pregnancy Care Clinic is a state-licensed community clinic which provides "[m]edical" and "clinical" services such as ultrasound examinations, pregnancy testing, health provider consultation, information on natural family planning, and prenatal vitamins, as well as non-medical services such as peer counseling, maternity clothes, and support groups. *Id.* at 91a-92a.

Petitioners moved immediately for a preliminary injunction and did not request discovery. Their motion relied solely on the factual allegations in their verified complaint, Pet. App. 47a n.2, and argued that the Act's disclosure requirements violated petitioners' First Amendment rights to free speech and the free exercise of religion, *id.* at 49a.

4. The district court concluded that petitioners were unlikely to succeed on the merits of their claims. Pet. App. 56a-69a. The Act's unlicensed facility requirements, the court concluded, would withstand "any level of scrutiny," because disclosure of a facility's unlicensed status was narrowly tailored to achieve the compelling interest of ensuring that women know

whether or not they are receiving care from a licensed professional. *Id.* at 66a-67a.

With respect to the licensed facility provisions, the court noted that, while "the Act requires medical providers to advise their patients of various types of treatment available so patients are fully informed," Pet. App. 61a, the notice was "neutral as to any particular view or opinion," did not make any recommendation, and did not preclude clinics from expressing disagreement, *id.* at 64a-65a. The notice requirement applied only to licensed medical institutions that provide specific medical services, *id.* at 61a-62a, was no broader than necessary, and was constitutional under intermediate scrutiny, *id.* at 64a-65a.

The court further determined that public policy and the balance of hardships favored not granting a preliminary injunction. Pet. App. 69a-71a. And in rejecting petitioners' Free Exercise claim, the court found "no evidence to suggest the Act burdens only conduct motivated by religious belief." *Id.* at 68a.

5. The court of appeals affirmed. Pet. App. 1a-43a.

The court reasoned that the Unlicensed Facility Disclosure was "narrowly tailored" to serve the State's "compelling interest in informing pregnant women when they are using the medical services of a facility that has not satisfied licensing standards set by the state." Pet. App. 37a. Because the requirement would pass even strict scrutiny, the court did not determine whether a lower standard should apply. *Id.*

As to the Licensed Facility Disclosure, the court rejected petitioners' argument that the requirement discriminates based on viewpoint, reasoning that "the Act applies equally to clinics that offer abortion and contraception as it does to clinics that oppose those same services." Pet. App. 21a. It noted that this Court

upheld a state mandated message from physicians to patients in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and that, consistent with *Casey*, it was appropriate to treat the Act's speech requirement like other regulations affecting speech in a professional context. Pet. App. 23a-28a; *see id.* at 30a (noting that "clients go to the clinic precisely because of the professional services it offers" and "reasonably rely upon the clinic for its knowledge and skill"); *id.* at 31a (observing that the notice contains information relating to the clinics' professional services and is provided as "part of the clinics' professional practice").

Because the Licensed Facility Disclosure was neither "treatment" itself (which would have been analyzed differently), nor part of a "public dialog" removed from particular patients' care (which would have been subject to strict scrutiny), the court reasoned that intermediate scrutiny applied. Pet. App. 31a-32a. The statute passed that test because it promoted public health while requiring from the clinics only what was necessary to alert women to the existence of the health-promoting services. *Id.* at 34a. Unlike laws that courts had struck down in other jurisdictions, the notice here did not "encourage, suggest, or imply that women should use" any service, *id.*, and did not suggest any governmental "preferences regarding prenatal care," *id.* at 36a. The court also rejected petitioners' claim that the Act discriminated against clinics that were motivated by religious belief. Pet. App. 40a-41a.

While the denial of preliminary relief was being considered on appeal, the case proceeded in the district court. On September 29, 2017, the district court dismissed Governor Brown as a defendant but otherwise denied the defendants' motions to dismiss. *See*

D.C. Doc. 62. Further district court proceedings have now been stayed at petitioners' request, pending this Court's decision. D.C. Doc. 67.

SUMMARY OF ARGUMENT

A woman seeking pregnancy-related advice and care should be able to know whether a facility that holds itself out as offering some such services is a licensed medical clinic capable of providing medical care, or a non-medical facility that can only provide something different and more limited. The First Amendment does not bar States from advancing that interest by requiring service providers to disclose a neutral statement of fact regarding the existence or not of a governmental license. Petitioners' further arguments about purported burdens posed by the statute's language and advertising requirements provide no basis for reversing the denial of a preliminary injunction, and were not in any event raised below.

The Licensed Facility Disclosure serves an equally compelling interest: It ensures that low-income women who are or may be pregnant have the information they need in order to seek, if they wish, the time-sensitive comprehensive medical care that is available through public programs. The statute is designed to reach an audience in need of such information at a critical moment. The carefully neutral, two-sentence notice is a permissible requirement in the relevant professional context, as confirmed by this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). This Court's compelled speech precedents do not bar the State from requiring such non-ideological statements of fact, delivered in a context featuring pervasive government-mandated notices that patients do not attribute to any clinic or physician, and in a manner which

will not interfere with or burden any clinic's own advocacy. The Act is not subject to strict scrutiny under this Court's precedents on content-based regulation, and it is not viewpoint discriminatory. In any event, although this Court's precedents do not require the application of strict scrutiny here, the Act's compelling purposes and close tailoring would satisfy even that standard.

ARGUMENT

I. THE UNLICENSED FACILITY DISCLOSURE IS CONSTITUTIONAL

A. The Disclosure Enables Women To Secure the Services They Deem Appropriate

"[T]o assure the protection of the public," California "requires that a person's competency [to provide healthcare] be determined by the state and evidenced by a license." *Magit v. Bd. of Med. Exam'rs*, 57 Cal. 2d 74, 85 (1961). Only physicians may practice medicine, and they must meet the Medical Board's strict qualifications and practice under that body's oversight. Cal. Bus. & Prof. Code §§ 2052, 2080-2433; *see generally Barsky v. Bd. of Regents of Univ. of State of N.Y.*, 347 U.S. 442, 451 (1954) (noting a State's "concern for maintaining high standards of professional conduct" with respect to physicians' "initial licensing" and "continuing supervision"). Although California permits various other healthcare professionals to provide certain services subject to the rules of their respective state licensing bodies, medical care is always provided by a physician or under a physician's close supervision.[16]

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[16] *See* Cal. Bus. & Prof. Code § 3502 and Cal. Code Regs., tit. 16,

Close regulation is necessary because physicians provide services and advice that are indispensable for the public but whose correctness and competence a layperson is usually unable to evaluate on his or her own. *Cf. Rosenberg v. Cahill*, 99 N.J. 318, 325 (1985) (discussing jurors' need for expert testimony to evaluate the appropriateness of medical care); *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986) ("A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance."). Careful regulation allows and encourages individuals to "trust [the professional's advice] with confidence." *Dent v. West Virginia*, 129 U.S. 114, 128 (1889).

The State takes similar care in regulating entities through which medical care is provided. Medical clinics, for instance, are licensed under various sections of the Health and Safety Code, with the Department of Public Health prescribing rules regarding safety, sanitation, staff qualifications, and "standards for providing the services offered." § 1226(a). Although many interactions with patients occur through unlicensed personnel, medical or nursing care must occur with a licensed professional present, and under the supervision of a physician or registered nurse. Cal. Code Regs., tit. 22, §§ 75027, 75028. And clinics must designate a licensed physician as the "professional director," who has the responsibility to "[a]ssur[e] the quality" of medical services, *id.* § 75027, "[r]eview[] and approv[e] all protocols used by the clinic," *id.*, and

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§ 1399.541 (physician's assistants must provide care under physician's supervision); 66 Ops. Cal. Atty. Gen 427, 1983 WL 144830, at *8 (registered nurses may provide nursing services independent of a physician's supervision, but must provide other care under "supervision by [the] physician who ... bear[s] responsibility for treating [the] patient").

ensure that employees do not act outside of their qualifications, *id.* § 75029(b).

These requirements, imposed on the entities and people who provide healthcare, are a powerful guarantee of the quality of aid that those seeking services will receive. They justify patients' reliance on the advice and services provided. And they allow the State to entrust licensed clinics with the power to provide services for "the care and treatment of patients for whom the clinic accepts responsibility." Cal. Code Regs., tit. 22, § 75026.

Members of the public may assume that a facility whose name, advertising, appearance, and services resemble corresponding aspects of licensed medical providers is regulated under these provisions. *See* pp. 6-8 & nn.12-15. But the distinction is critical: Whatever their outward appearance, unlicensed institutions and individuals are not subject to the comprehensive regulation that governs physicians and licensed clinics. Disclosure of such an entity's unlicensed status ensures that women who seek state-licensed, professional medical care are not unwittingly diverted to facilities unable to provide it, and thus helps "women to seek the care they wish to obtain." J.A. 43. That, in turn, has important health implications. Misdirection is concerning in any context, but it can be especially dangerous for pregnant women of limited means. Work schedules, child-care needs, limited funds, and transportation difficulties can significantly constrain such a woman's ability to visit multiple facilities. A woman who wants a licensed professional but uses her limited available time to mistakenly go to an unlicensed facility may then be unable to schedule an actual medical visit until much later. The effect may be to subject her to significantly increased medical

risks and potentially even a complete inability to access some services, such as safe and lawful abortion.

B. The Disclosure Facially Satisfies *Zauderer* or Any Other Standard of Review

1. In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), this Court held that Ohio could not prohibit lawyers from including legal advice in their advertisements, *id.* at 644-647, but could require lawyers advertising contingency arrangements to disclose that clients might be liable for litigation costs if their cases were unsuccessful, *id.* at 650-653. The Court reasoned that there are "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. An advertisement that promised, "'if there is no recovery, no legal fees are owed by our clients,'" had a "self-evident" capacity to mislead a layperson unaware of the distinction between legal fees and litigation costs. *Id.* at 652. Although "unjustified or unduly burdensome disclosure requirements might offend the First Amendment," there is only a "minimal" constitutionally protected interest in not providing "factual and uncontroversial information" about "the terms under which [one's] services will be available." *Id.* at 651. *Zauderer* therefore held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.*

Consistent with *Zauderer*, this Court's opinions make clear the government's power to require disclosures that will eliminate potential confusion about the legal or professional status of one who offers services to the public. For instance, *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), struck down various disclosures that would

have burdened the speech of paid charitable fundraisers (*see* p. 41, *infra*), but made clear that that a requirement for the fundraisers to "disclose unambiguously [their] professional" (meaning paid) status would "withstand First Amendment scrutiny." *Id.* at 799 n.11. And *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), upheld a federal statute that required qualifying professionals to state in their advertisements that "'[w]e are a debt relief agency.'" *Id.* at 233; *see id.* at 250 (reasoning that the disclosure "entail[ed] only an accurate statement identifying the advertiser's legal status and the character of the assistance provided, and [did] not prevent debt relief agencies ... from conveying any additional information"). *See also Meese v. Keene*, 481 U.S. 465, 480 (1987) (stating that statutorily mandated disclosure of a film's connection to a federally registered agent of a foreign government would "better enable the public to evaluate the [film's] import"); *In re R.M.J.*, 455 U.S. 191, 201, 203, 205, 207 (1982) (distinguishing between warnings or disclaimers that "might be appropriately required ... in order to dissipate the possibility of consumer confusion or deception," and the State's impermissible effort to ban lawyers from advertising membership in "the Bar of the Supreme Court of the United States").

2. The Unlicensed Facility Disclosure consists of "purely factual and uncontroversial information about the terms under which [the facility's] services will be available." *Zauderer*, 471 U.S. at 651. It "entail[s] only an accurate statement identifying the advertiser's legal status and the character of the assistance provided, and [does] not prevent [the facility] from conveying any additional information." *Milavetz*, 559 U.S. at 250. It helps to "better enable [a woman] to evaluate" the services that she receives. *Keene*, 481 U.S. at 480; *see* J.A. 43 (disclosure "provid[es] context

for counseling given at these unlicensed facilities"). And it allows women to judge for themselves whether "'their own best interests,'" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011), would be served by supplementing the facility's non-medical services with medical care and advice from a licensed provider.

In these respects, the requirement advances interests similar to those served by a host of laws under which States require disclosure of a service-provider's non-professional status to prevent confusion. For instance, statutes and court rules require paralegals, notaries, and those providing immigration assistance to disclose to clients and the public that they are not lawyers.[17] Lawyers licensed in one jurisdiction may be required to disclose that they are not licensed to practice in another jurisdiction where they have an office.[18] And an alternative health practitioner may be required to disclose that he or she is "not a licensed physician" and that "the services to be provided are not licensed by the state."[19]

Reflecting the statute's focus on the heightened informational needs of pregnant women, the Unlicensed Facility Disclosure applies only to facilities that primarily serve those seeking pregnancy-related services. § 123471(b). In line with the Legislature's concern that women not mistake an unlicensed facility for a licensed medical provider, the disclosure requirement applies only to a facility that is unlicensed and does not provide care supervised by licensed providers,

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[17] *See, e.g.*, Ariz. Rev. Stat. § 41-329; Cal. Gov't Code § 8219.5(a); N.Y. Gen. Bus. Law § 460-c(1)(a); Tex. Gov't Code § 406.017(b); Ky. Sup. Ct. R. 3.700, sub-rule 7; N.H. Sup. Ct. R. 35-8; N.M. R. Ct. 20-104.

[18] *See, e.g.*, D.C. Rule of Prof. Conduct 7.5(b).

[19] Cal. Bus. & Prof. Code § 2053.6.

but whose activities—such as "obstetric ultrasounds," "prenatal care," "pregnancy testing or diagnosis," and "collect[ing] health information from clients"—could mislead or confuse women about whether the facility is licensed to provide medical care. § 123471(b). Unlicensed entities that provide services such as counseling, diapers and maternity clothes (Pet. Br. 4-5), but not additional services suggesting professional medical care, are not required by the Act to disclose anything.

The disclosure itself is limited and neutral, and contains no advice about what the woman should do. The woman alone decides whether the unlicensed status of an entity is pertinent to her needs. The disclosure neither states nor implies any opinion about the relative value of licensed and unlicensed facilities and any non-medical services they provide.[20] To the extent that the absence of a license implies a particular facility's inability to offer *medical* services, that is inherent in the system of licensing to begin with, and an unlicensed facility would be in violation of California law if it did provide such care.

Petitioners suggest that the State should address its concerns through various other approaches rather than the disclosure enacted here. Such an analysis generally is not required under *Zauderer*. *See Zauderer*, 471 U.S. at 651 n.14; *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476-477 (1989). In any event, a state-maintained registry of unlicensed pregnancy centers (Pet. Br. 57) would not necessarily

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[20] *Cf. Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 250 (2d Cir. 2014) (striking down portion of ordinance requiring unlicensed facilities to state that the city health department "'encourages women who are or who may be pregnant to consult with a licensed provider'"); *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013) (en banc) (similar).

be accessible or helpful to the women most likely to avail themselves of free pregnancy facilities and most likely to be confused or deceived by such centers' quasi-"medical" appearance and services. *Cf. Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1413 (2017) (misleading nature of a statement can depend on the audience's level of sophistication). Nor would such a registry inform women at the moment of service that a particular facility is not licensed. And the creation and maintenance of such a registry might require intrusions of a different sort—registration or monitoring of non-medical providers—that the Legislature could reasonably prefer to avoid.

Petitioners are similarly wrong to suggest (Pet. Br. 56) that it would necessarily be preferable, from a First Amendment standpoint, to prohibit the kinds of speech that could mislead women rather than require this simple one-sentence disclosure. A one-sentence disclosure that leaves unlicensed facilities otherwise free "to express whatever views they may have," *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 60 (2006), may well impinge on speech interests less than the monitoring and evaluation of the content of speech that petitioners' alternative would presumably entail. *See* p. 54, *infra*.

Hypothetical other approaches are especially irrelevant here because the record discloses no evidence that the disclosure will in fact burden petitioners' legitimate advocacy. Petitioners have every right to advocate their positions on family planning and abortion, both publicly and to individual women. But they do not have a right to attract women into their facilities based on confusion or deception about their ability to provide professional medical care—particularly when the consequences of such misdirection could so significantly affect those women's health and lives.

The only women whom the notice will dissuade from going to such a facility are those who would only have gone there because they were misled or confused.

3. The district court did not abuse its discretion by declining to preliminarily enjoin the Act based on allegations and arguments about the statute's language and advertising requirements that were not presented to that court or substantiated in the record.

Section 123472 provides that the Unlicensed and Licensed Disclosures must be provided "in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located." The statute also requires that the Unlicensed Disclosure must be "disseminate[d] to clients" both on-site and "in any print and digital advertising materials including Internet Web sites." § 123472(b).

These provisions serve important purposes. California contains substantial populations of low-income non-English speakers, for whom disclosures in English alone would be ineffective.[21] And given the socioeconomic circumstances of the women who are most in need of free services, a disclosure of unlicensed status that does not come until a woman has already mistakenly arrived at an unlicensed facility may be too late—she will already have used her limited time and money to travel to a non-medical provider, leaving her little ability, in the timeframe needed, to go to the licensed

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[21] *See* Cal. Dep't of Health Care Svcs., Frequency of Threshold Language Speakers in the Medi-Cal Population by County for January 2015, at 1 (Sept. 2016), http://www.dhcs.ca.gov/dataandstats/statistics/Documents/Threshold_Language_Brief_Sept2016_ADA.pdf (38% of the Medi-Cal population reports a primary language other than English).

provider she really sought. *See* p. 6, *supra*. The district court did not abuse its discretion in denying preliminary relief against these provisions, because neither the face of the Act nor any evidence in the record shows that these benefits are outweighed by burdens the provisions impose.

Petitioners' current contention that the language requirement is unduly burdensome because it will require notices in multiple languages—13 in Los Angeles County, and six in San Diego County (Pet. Br. 2, 11-12, 38)—was never put before the district court and is not supported by any evidence in the current record. *See* D. Ct. Doc. 3 (Motion); D. Ct. Doc. 17 (Reply); Pet. App. 85a-122a (Complaint). The district court record likewise contains no specific allegation resembling petitioners' contention (Pet. Br. 39) that the advertising requirement will make advertising impossible or unaffordable.[22] That court thus had no reason to explore whether any burdens were disproportionate to the purposes of these provisions, and the State had no opportunity to produce relevant evidence of its own. Under these circumstances, this Court has no basis to reverse. *See Taylor v. Illinois*, 484 U.S. 400, 410–411 (1988) ("The adversary process [cannot] function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to

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[22] *See* Pet. App. 100a (alleging generally that web advertisements on services such as Google "have limits on their size, such as in the number of characters that can be used," but providing no information about what those limits are or how petitioners' advertisements would be affected, or what newspaper advertising costs might be); D. Ct. Doc. 51, at 20 (Jan. 28, 2016, Tr.) (court's observation about the absence of information in the record regarding "what [the plaintiffs'] advertisements say and how they might be impacted by the disclosure required by the statute").

assemble and submit evidence to contradict or explain the opponent's case.").

As the district court case proceeds to final judgment, petitioners will have ample opportunity to properly raise these issues for judicial decision. And the district court, in turn, will have an opportunity to determine issues of jurisdiction and statutory meaning preliminary to any decision on the merits.[23] If petitioners substantiate their allegations of burden, then the district court would be well-positioned to consider an appropriate remedy that would alleviate the burden and give effect to the statute's severability clause. Pet. App. 82a-83a. But the district court did not abuse

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[23] Petitioners would need to submit evidence establishing their standing to raise challenges based on requirements imposed in Los Angeles County. *Compare Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (noting plaintiff's burden to establish standing at each stage of the case), *with* Pet. App. 89a (specific geographic allegations regarding only San Diego County plaintiffs); *see also Virginia v. Hicks*, 539 U.S. 113, 119-120 (2003) (plaintiff seeking relief under overbreadth doctrine must show that a law's unconstitutional applications are "'substantial'" in comparison to its constitutional applications). If there is standing, the district court would need to consider whether, under California law, a clinic could satisfy the statute's informational purposes and achieve full or "substantial" compliance by, for example, including the disclaimer on the website to which a search-engine advertisement links, rather than as part of the search-engine advertisement itself. *See, e.g., City of Santa Monica v. Gonzalez*, 43 Cal. 4th 905, 925 (2008). And the district court would similarly need to determine whether full or substantial compliance with the language requirement requires printed statements in *every* Medi-Cal threshold language, as petitioners maintain, or only in the few most important languages, as § 123472's use and placement of the modifier "primary"—which is atypical of California statutes and regulations referencing Medi-Cal threshold languages—could imply. *Cf., e.g.*, §§ 128552, 128565; Ins. Code § 10112.8(c)(5); Bus. & Prof. Code § 1971(f); Cal. Code Regs., tit. 9, § 1810.410(a)(3).

its discretion by failing to enter a preliminary injunction on the basis of arguments that were never made, let alone substantiated, before it, and there is no reason for this Court to consider those arguments in the first instance. *See generally, e.g., Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) ("'We are a court of review, not of first view.'").

II. THE LICENSED FACILITY DISCLOSURE IS CONSTITUTIONAL

Petitioners also challenge Section 123472(a)'s requirement that licensed medical clinics must provide patients with a notice disclosing the existence of publicly funded full-service healthcare programs. The two-sentence Licensed Facility Disclosure provides neutral information of great importance, in a manner consistent with the State's ability to regulate in the professional context. It is just one of a number of non-ideological notices required in the healthcare field, which will not be misattributed to petitioners and will not interfere with their own message. And although this Court's precedents on content-based regulation and viewpoint discrimination do not require the application of strict scrutiny here, the Act would satisfy even that standard, in light of the interests the law advances and the narrow tailoring it reflects.

A. The Disclosure Provides Vital Factual Information to a Specific Population at a Critical Point

In healthcare, information can "save lives," *Sorrell*, 564 U.S. at 566, permit "alleviation of physical pain," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-764 (1976), and enable people to act in "'their own best interest,'" *Sorrell*, 564 U.S. at 578. Information about how to receive prenatal care lessens the risk of illness, mortality, miscarriage, and birth defects. *See* p. 3, *supra*. And

information about contraception and abortion allows women to decide whether and when to obtain legal medical treatments concerning "intimate and personal choices ... central to personal dignity and autonomy." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.).

The Act is crafted to address the needs of a narrow class of women in great need of information. Information concerning state-funded prenatal care, family planning, and abortion is appropriately targeted to clinics whose "primary purpose" is the provision of "family planning or pregnancy-related services," including clinics that provide abortions. § 123471(a) & (a)(5). Because the disclosures are especially relevant to low-income women unable to pay for care on their own, they are targeted to "free clinic[s]" that do not charge patients for services or drugs, and to "community clinic[s]" that accept payment on a sliding scale based on ability to pay. § 1204(a)(1)(A), (B). In short, the statute gets information to women who are most likely to need it at the time when it will most likely be noticed and useful.[24]

For a woman whose informational needs are being met by the counseling she receives at a clinic bearing the notice, the disclosure will have little effect. She will not call the phone number on the notice, and the notice certainly will not dissuade her from continuing to work with the clinic. But for a woman who is dissatisfied, who has been misled, or who did not previously understand the availability of other low-cost sources of advice or care, the notice may be of great

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[24] *Cf. Sorrell*, 564 U.S. at 578 (listeners considered "targeted" promotional activities "'very helpful'").

importance. For her, the notice's brief acknowledgment of free and low-cost programs offering a comprehensive range of care ensures her ability to "access ... a multiplicity of information sources"—"a governmental purpose of the highest order." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994). Indeed, some women who greatly value the clinic's services and counseling may still benefit from the notice's information about ways to supplement those services with additional sources of care.

At the same time, the Legislature crafted the disclosure requirement in a manner that fully respects a clinic's ability to limit what services it will provide or endorse. The Act does not require any clinic to provide, discuss, or refer for any service. Clinics must provide only the barest notice of how the *patient* may access information about eligibility for public programs providing comprehensive reproductive healthcare should *she* choose to do so. And the Act's flexibility allows clinics to provide that notice in a manner that will not limit their ability to engage in their own advocacy.

California respects petitioners' desire not to associate themselves with, or express any moral approval of, contraception or abortion. The Licensed Disclosure does not urge women to seek any particular type of care or imply anything about the care that would be appropriate for any particular woman. The mere statement that patients may have a method by which to access comprehensive care, including family planning and abortion, through a public program does not suggest that they should seek or obtain any particular form of care. And it does not put the licensed facility in the position of associating itself with any services it does not wish to provide.

The Act strikes a balance between women's interest in not being deprived of vital healthcare information by the licensed practitioners whom they entrust with their care, and practitioners' interest in avoiding activities that conflict with their personal beliefs. California, like many States, works hard to devise solutions that reduce the severity of any conflict between a professional's interest in adhering to her personal beliefs and a patient's need for complete care and accurate information. *See, e.g.*, § 123420 (prohibiting healthcare employers and schools from disciplining those who refuse to perform or assist with abortions, and allowing religiously affiliated hospitals to refuse to provide abortions if they inform consumers of their policy). This statute fits within that pattern and is, in fact, less onerous than ethical standards recognized by the relevant professional community.[25] As demonstrated below, nothing in this Court's precedent precludes this modest effort to provide needed information at minimal burden to licensed facilities that choose to limit the services that they themselves will provide.

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[25] *See, e.g.*, Comm. on Adolescence, Am. Acad. of Pediatrics, Counseling the Adolescent About Pregnancy Options, 101 Pediatrics 938, 939 (1998) ("[t]he pediatrician should discuss ... all three options"—"[c]arrying her pregnancy to delivery and raising the baby"; "[c]arrying her pregnancy to delivery and placing the baby for adoption"; and "[t]erminating her pregnancy"—or should "refer the adolescent to a health care professional who will discuss all three options"); *cf.* Comm. on Ethics, American College of Obstetricians & Gynecologists, The Limits of Conscientious Refusal in Reproductive Medicine (2007, reaffirmed 2016), https://www.acog.org/-/media/Committee-Opinions/Committee-on-Ethics/co385.pdf.

B. The FACT Act's Limited, Neutral Disclosure Requirement Is Permissible in Its Professional Context

1. The court of appeals upheld the Licensed Disclosure as a permissible regulation of professional speech. Pet. App. 25a-36a. Applying the First Amendment in this context requires sensitivity to how speech functions in a professional's practice. *See Lowe v. SEC*, 472 U.S. 181, 207-208 (1985); *id.* at 227-233 (White, J., concurring); *Thomas v. Collins*, 323 U.S. 516, 544-548 (1945) (Jackson, J., concurring). Much of what some professionals do—such as a physician's treatment recommendations, or an attorney's advice and advocacy—occurs through speech. In such contexts, the First Amendment must be applied so as to ensure that "the power of government to regulate the professions is not lost" simply because "the practice of a profession entails speech." *Lowe*, 472 U.S. at 228 (White, J., concurring).

This Court has never directly articulated the test that should apply to speech requirements in such cases. In *Casey*, however, this Court considered the constitutionality of a Pennsylvania statute that, among other things, required medical professionals to deliver certain state-specified information to patients seeking an abortion. Some of the information pertained to the "'nature of the proposed procedure'" and material "'risks and alternatives.'" 505 U.S. at 902 (plurality opinion) (quoting 18 Pa. Cons. Stat. § 3205(a)(1)). But the statute also required that each woman seeking an abortion be informed that:

> "(i) The [Pennsylvania Department of Health] publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review

> the printed materials and that a copy will be provided to her free of charge if she chooses to review it.
>
> "(ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department.
>
> "(iii) The father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion.* * * *"

Id. at 903 (quoting Pa. Cons. Stat. § 3205(a)(2)).

Beyond simply informing women of the availability of state-provided printed materials, the law required the clinic to itself provide a copy of those state publications to any woman who asked. 505 U.S. at 903 (quoting Pa. Cons. Stat. § 3205(a)(3)).

This Court upheld those requirements. *See* 505 U.S. at 884-885 (plurality opinion); *id.* at 968-969 (Rehnquist, C.J., concurring in the judgment and dissenting in part). As the United States observes, *Casey* did not establish a special First Amendment test for speech concerning abortion. U.S. Br. 18-19. Instead, the plurality opinion considered the constitutionality of the disclosure requirement in light of its professional character and context. The medical providers objected that the State was requiring them to disclose information "beyond the expertise of medical professionals" and that the requirements could not withstand First Amendment scrutiny.[26] The plurality

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[26] Br. for Petitioners, *Casey*, 1992 WL 12006398, at *9, *53-55.

opinion concluded, however, that there was "no constitutional infirmity." 505 U.S. at 884. Although the physician's "First Amendment rights not to speak [were] implicated" by the statute, they were affected only "as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Id.* The requirement was constitutional because ensuring knowledge about "the availability of information relating to ... the assistance available should [the woman] decide to carry the pregnancy to full term" was "reasonable ... to ensure [her] informed choice." *Id.* at 883.

The Licensed Facility Disclosure here is, if anything, less burdensome and problematic than the disclosures that *Casey* upheld. The law in *Casey* required physicians or clinics themselves to give patients, upon request, state-prepared publications containing extensive state messages. California's statute requires only a two-sentence notice that services are available to eligible women through public programs and that a county office can provide more information if it is desired. The law upheld in *Casey* required that detailed information be personally given by the physician or her designee. California's law offers clinics multiple ways to deliver the relevant notice. The mandatory disclosure in *Casey* addressed only alternatives to abortion, and signaled that abortion was a disfavored choice. The California disclosure neutrally notes the availability of state-funded programs providing a full range of care—prenatal care, family planning, and abortion. Finally, California's law contains nothing similar to the *Casey* statute's requirement that disclosures be delivered at a time (at least 24 hours before an abortion, 505 U.S. at 844) that increased the burdens on speakers and listeners alike and required additional appointments and travel.

2. The factors justifying special treatment of speech claims in the professional context are present in this case.

A central factor distinguishing the professional context from others is that a professional "takes the affairs of [a client] personally in hand and purports to exercise judgment on [the client's behalf] in the light of his individual needs or circumstances." *Lowe*, 472 U.S. at 232 (White, J., concurring). This applies to Licensed Covered Facilities—which by definition are licensed to provide services "for the care and treatment of patients for whom the clinic accepts responsibility." Cal. Code Regs., tit. 22, § 75026 (governing clinics licensed under Health & Safety Code § 1204).

A disclosure does not lose its professional nature in this respect simply because it is made by a non-physician or can take place in writing. *See, e.g., Casey*, 505 U.S. 902-903. The State's ability to regulate healthcare providers extends beyond physicians, "to the regulation of all professions concerned with health." *Barsky*, 347 U.S. at 449. California law, in any event, ensures that disclosures made by others at the clinic, like all interactions between patients and clinic employees, are ultimately under the supervision and authority of the "licensed physician" who has been designated as the clinic's "professional director," and who has the responsibility to "[a]ssur[e] the quality" of medical services provided to all patients, and "[r]eview[] and approv[e] all protocols used by the clinic." Cal. Code Regs., tit. 22, § 75027. The Licensed Disclosure's effect on First Amendment rights therefore occurs as part of the overall "regulation" of physicians in "the practice of medicine." *Casey*, 505 U.S. at 884. California law permits the disclosure to be made by a physician. Allowing it to be made as well by another employee—or by a posted sign—simply permits

the clinic (at the physician director's discretion) to deliver the disclosure in whatever manner it considers least burdensome.

The duty to obtain informed consent (Pet. Br. 46-48) is not the only informational duty medical professionals owe to their patients. Patients may depend upon medical professionals for assistance in understanding a variety of issues—such as whether the patient is eligible for clinical trials.[27] Physicians must also tell patients or others about financial conflicts of interest and about potential consequences that a medical condition could have on third parties.[28] If physicians may not be required to disclose information about financial aspects of healthcare decisions, then it is hard to understand *Casey*'s determination that Pennsylvania could require physicians to distribute state-printed pamphlets on adoption and child support as part of its "regulation" of "the practice of medicine." 505 U.S. at 884.

3. There is no merit to petitioners' argument (Pet. Br. 16, 47-48) that speech claims in the professional context are subject to a stricter standard of review if the professional does not charge for the services rendered. The question of whether providers charged for abortions was not discussed in *Casey*, although it appears that some of the abortions at issue may have

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[27] *See* Bruce, et al., Clinical Case: Is There a Duty To Inform Patients of Phase I Trials, 11 Virtual Mentor: Am. Med. Assoc. J. Ethics 207, 209 (2009).

[28] *E.g.*, Cal. Bus. & Prof. Code §§ 654.2, 650.02 (conflict of interest disclosures); *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425 (1976) (duty to disclose information that will protect someone whom a patient may harm).

been performed without charge.[29] Although petitioners claim that a special rule for noncharging professionals is appropriate under *In re Primus*, 436 U.S. 412 (1978), and *NAACP v. Button*, 371 U.S. 415 (1963), neither case supports that view. *See* U.S. Br. 20-24.

Button held that Virginia could not punish the NAACP for soliciting potential plaintiffs to file civil rights lawsuits with the NAACP as counsel. 371 U.S. at 428-444. *Primus* held that a State could not discipline an attorney for informing a forced-sterilization victim that the ACLU might represent her for free. 436 U.S. at 416-421. In each case, the "solicitation of prospective litigants ... for the purpose of furthering [the organization's and its members'] objectives" fell squarely "within the right 'to engage in association for the advancement of beliefs and ideas.'" *Id.* at 423-424 (quoting *Button*, 371 U.S. at 430); *see Button*, 371 U.S. at 430 (discussing "constitutional protection for ... cooperative, organizational activity").

Thus, under *Primus* and *Button*, interference with an organization's associational right to attract members and allies for collective action through litigation receives "'exacting scrutiny'" in order to avoid "'unnecessary abridgment of associational freedoms.'" *Primus*, 436 U.S. at 432; *see United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971) (*Button* concerned the "right to group legal action"). The cases did not turn on whether the professionals involved charged for their services. They rested instead on concern about government preventing people from banding together with the aid of professionals to undertake

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[29] *See Planned Parenthood of Se. Penn. v. Casey*, 744 F. Supp. 1323, 1338 (E.D. Pa. 1990) (noting that one plaintiff-clinic never turned away patients because of their inability to pay).

public advocacy in pursuit of common goals. That principle has no apparent application to this case.

Petitioners' proposed rule would be inappropriate, because a client's need for competent, objective, and confidential legal advice, or a patient's need for competent and complete medical advice, does not change based on payment of a fee. *See* U.S. Br. 20-21. To the extent that the presence or absence of a profit motivation may affect the need for a particular regulation, that possibility may be better accounted for under general standards rather than through any categorical rule regarding non-profit professional practice. Here, women who have sought free medical care from licensed clinics that choose to provide a limited range of services are not less likely than their paying counterparts to benefit from a notice about the potential availability of comprehensive, publicly funded services. To the contrary, they are more likely to need that information.

C. The Disclosure Requirement Is Consistent with This Court's Compelled-Speech Precedents

Petitioners argue primarily that the Act is invalid as compelled speech under this Court's precedents. Pet. Br. 22-28. But the Licensed Facility Disclosure is a brief, non-ideological notice that readers will quickly identify as simply one of many government-mandated notices in the healthcare context. The flexibility built into the Act also allows clinics to present the disclosure in a manner that poses no significant burden to the clinic's own message. This limited notice requirement is consistent with this Court's precedents on compelled speech.

1. The Act Does Not Require a Statement or Endorsement of Belief

The "'heart of the First Amendment'" is the principle that "'each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.'" *Agency for Int'l Dev. v. Alliance for Open Soc'y*, 570 U.S. 205, 213 (2013) (quoting *Turner*, 512 U.S. at 641). This Court is thus especially wary when the government attempts to "compel the endorsement of ideas that it approves." *Knox v. Svc. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012). The notice at issue here is nothing like the types of compelled statements that this Court has disapproved on that ground.

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (discussed in Pet. Br. 23-24, 58), considered whether the First Amendment permitted a State to require public school students to salute the flag while reciting in unison a pledge of "allegiance" to the flag and the United States. *Id.* at 626 n.2. West Virginia's policy effectively compelled students to "declare a belief," affirm a "slogan," and "communicate ... acceptance of the political idea[]" of "adherence to government as presently organized." *Id.* at 631, 633. *Barnette* held that participation in a "ceremony so touching matters of opinion and political attitude" could not be constitutionally imposed. *Id.* at 636. The decision is "inapposite" to cases that, like this one, do not "involve[] the compelled recitation of a message containing an affirmation of belief." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

Wooley v. Maynard, 430 U.S. 705 (1977) (discussed in Pet. Br. 1, 23-25), held that it was unconstitutional for New Hampshire to require drivers to display, on their license plates, the state motto "'Live Free or Die.'"

Id. at 707. The State was compelling its residents to display an "ideological message." *Id.* at 713, 715. As in *Barnette*, the constitutional error was in requiring an individual to serve as "an instrument for fostering public adherence to an ideological point of view." *Id.* at 715; *see id.* at 717 (describing state motto as "an official view as to proper appreciation of history, state pride, and individualism").

Most recently, in *Agency for International Development*, the Court considered a statute which made federal funding available only to organizations with "'a policy explicitly opposing prostitution and sex trafficking.'" 570 U.S. at 208. The statute, which forced grantees to "profess" and officially "adopt" a "belief," *id.* at 218, was unconstitutional for the same reason as the pledge-of-allegiance requirement in *Barnette*, *id.* at 220-221.

Unlike the regulations at issue in *Barnette*, *Wooley*, and *Agency for International Development*, California's law requires no affirmation, express or implied, of private agreement with a government-favored viewpoint or position. Nor does it burden the clinics' speech by requiring the retaliatory distribution of private, ideologically-opposed speech. *Cf. Pac. Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 12 (1986) (plurality opinion).[30] Instead, it requires only notification of purely factual information stated in a way that is "truthful and not misleading." *Casey*, 505 U.S. at 882 (plurality opinion). California's requirement does not implicate the concerns raised

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[30] In *Pacific Gas*, this Court disapproved of a regulator's decision to respond to a utility's distribution of a publication containing "political editorials" by forcing it to replace that publication with one from an organization that opposed the utility in ratemaking proceedings. *Id.* at 5.

where the government requires physicians to tell patients inaccurate or disputed "facts" designed to steer the patient's decision one way or another, or requires disclosures whose content and context are calculated to inspire emotional distress or revulsion.[31] To be sure, contraception and abortion are the subject of vigorous debates encompassing disputes on a variety of moral, religious, and factual issues. But the phone number and factual existence of the public programs noted in the Licensed Facility Disclosure are not subject to dispute. Nor do they imply the desirability or undesirability of abortion or any form of contraception, either in general or in any particular case. The only way that such a limited disclosure could be "opposite" (Pet. Br. 38) to a factual assertion by a clinic would be if the clinic were deceiving women about the existence of such programs.

In *Rumsfeld*, for instance, universities opposed to federal military policies on gay and lesbian personnel challenged a law that required them to send messages such as "'[t]he U.S. Army recruiter will meet interested students in Room 123 at 11 a.m.'" 547 U.S. at 62. Notwithstanding vigorous debate about military

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[31] *Cf. Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008) (en banc) (discussing required disclosure that abortion subjects a woman to a risk of suicide and "'will terminate the life of a whole, separate, unique, living human being,'" with whom the woman "'has an existing relationship ... enjoy[ing] protection under the [federal] Constitution and [state law]'"); *Stuart v. Camnitz*, 774 F.3d 238, 255 (4th Cir. 2014) (disclosure delivered during invasive procedure and intended to express "moral condemnation"); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012) (disclosure featuring graphic medical images "intended to evoke an emotional response"), *overruled by Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc). *See generally Casey*, 505 U.S. at 936 n.7 (Blackmun, J., concurring and dissenting).

policies, the facts stated in such messages were not a subject of dispute. And compelling a law school to send such messages was "simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die.'" *Id.* The compelled statement of fact was "subject to First Amendment scrutiny," *id.*, which consisted of careful consideration of the burdens involved. Those burdens were revealed to be insubstantial, and the law was upheld. *See* pp. 40, 43-45, *infra*.[32]

Similarly, in *Riley*, this Court considered several disclosures that North Carolina required hired charitable fundraisers to make as part of their solicitations. 487 U.S. at 786. The Court held unconstitutional a requirement for fundraisers to disclose their historical compensation—in part because such a disclosure tended to imply certain charities' inferiority and hamper their solicitation efforts. *Id.* at 799-800 (noting that "small or unpopular charities" would be more likely to rely on professional fundraisers whose costs would have to be disclosed and would discourage donors, whereas larger and more popular charities could rely on employees and volunteers). In contrast, *Riley* explained, a requirement for charitable solicitors to "disclose unambiguously [their] professional status" would "withstand First Amendment scrutiny." *Riley*, 487 U.S. at 799 n.11. The latter requirement (like the statute's requirement that paid fundraisers divulge their names and addresses, *see id.*) did not tend to imply the superiority or inferiority of any particular speaker. It thus did not burden anyone's speech, much like the Licensed Disclosure Requirement here.

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[32] Although the challenged policy was implemented as a funding condition, *Rumsfeld* did not rely on any extra deference that might have resulted from analyzing it as a funding restriction. *Id.* at 59-60.

2. The Delivery of Governmental Notices in Healthcare Does Not Hamper Clinics' Ability To Present Their Own Messages

1. The disclosure required by the FACT Act is simply one among many government-mandated notices in the healthcare context. The notice's content—which states only that programs covering certain services are provided by the State of California—will be understood as coming from the State. There is little or no risk that it will be misunderstood as undercutting, or implying anything about, the clinic's own views.

Patients visiting medical or dental facilities see many government-prescribed notices and disclosures. Some disclose information about the medical professionals who provide and supervise the facility's services.[33] Others inform patients of the provider's legal duties and of patients' rights.[34] Additional notices

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[33] *E.g.*, Cal. Code Regs., tit. 16, § 1355.4 (requiring physicians to post a notice informing patients that "Medical doctors are licensed and regulated by the Medical Board of California" and providing the Board's phone number and web address); *id.* § 1611.3 (similar requirement for dentists); *id.* § 1399.547 (similar requirement for physician's assistants).

[34] *E.g.*, 45 C.F.R. § 164.520(b)(1) (notice regarding privacy); 42 U.S.C. § 1395cc(a)(1)(N)(iii) (notice about emergency room duty to provide care); Cal. Code Regs., tit. 16, § 1707.6 (required pharmacy postings).

warn about dangerous substances used in treatments.[35] And others are included with pharmaceuticals that the clinic dispenses.[36] Indeed, government-mandated disclosures are particularly prevalent in the pregnancy context, where there is a special need to familiarize patients with information that prior experience may not have exposed them to.[37]

Patients understand that a clinic's role in serving as a conduit for such notices is not self-expression. *See Rumsfeld*, 547 U.S. at 64 ("A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper...."). [38] Thus, although California's law leaves clinics entirely free to expressly disavow the notice, *see PruneYard*, 447 U.S. at 87-88 (distinguishing *Barnette* from cases

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[35] *E.g.*, Cal. Office of Environ. Health Hazard Assessment, Dental Warnings, https://www.p65warnings.ca.gov/places/dental-office (last visited Feb. 19, 2018).

[36] *See* 21 C.F.R. pt. 201 (prescription drug label requirements).

[37] *See, e.g.*, Tex. Health & Safety Code § 161.501(a) (requiring healthcare workers to provide to pregnant women, during gestation or at delivery, a pamphlet concerning postpartum depression, safe baby care, and childhood diseases and vaccinations); 410 Ill. Comp. Stat. 253/4 (requiring hospitals to distribute to all new parents a pamphlet about immunization); Cal. Health & Safety Code § 1204.3(a)(5) (requiring birthing centers to deliver summary of child-car-seat laws, list of car-seat installation programs, and information about the risks of not using a car seat).

[38] Private law schools deliver highly opinionated speech on a variety of social and political issues—including (for some) speech directly at odds with the military recruiting policies giving rise to the dispute in *Rumsfeld*. What mattered, in this Court's analysis, was not the expressive context of the law schools' overall activity, but rather the particular activity (hosting recruiters) in which the school was required to host the government's message. *Id.*

where objectors are "free to publicly dissociate themselves" from the objected-to message), no "disavowal" should be necessary, because the required notice does not suggest any "avowal" in the first place. Just as "[n]othing about recruiting suggests that law schools agree with any speech by recruiters," *Rumsfeld*, 547 U.S. at 65, nothing about medical practice implies that any particular disclosure represents a physician's or clinic's personal choice. *See id.* at 61-62 (rejecting challenge to federal law that effectively required schools to "send e-mails or post notices on bulletin boards" providing information on the federal recruiters' behalf, based in part on the low risk of any compelled message being misattributed to the schools themselves); *Pruneyard*, 447 U.S. at 87 (upholding requirement that shopping centers be open for protest, based in part on the judgment that, in the shopping-center context, views expressed by protestors would "not likely be identified with those of the owner").

Indeed, a medical provider's transmission of such messages is not necessarily expression at all. The act of delivering what is clearly a government notice transmitted in response to legal requirements—particularly where that notice is non-ideological and does not amount to "a Government-mandated pledge or motto"—can be properly recognized as expressive conduct, subject at most to the intermediate scrutiny test of *United States v. O'Brien*, 391 U.S. 367 (1968). *Rumsfeld*, 547 U.S. at 62, 65-66; *cf. Turner*, 512 U.S. at 661-662 (applying *O'Brien* test to statute requiring cable systems to transmit signals of local broadcasters).

2. Like the recruiting assistance required in *Rumsfeld*—and the myriad disclosure requirements to which licensed medical providers are already subject—compliance with the Licensed Clinic Disclosure

requirement is a "minimal" accommodation that requires little effort and no significant monetary expenditure. *Rumsfeld*, 547 U.S. at 61 n.4. Petitioners do not claim that compliance will divert resources or staff time that would otherwise be spent on the clinic's own speech. Nor, especially given the flexible options for delivery, is there any chance that the required notice might crowd out clinics' own message from a limited space. *Cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-257 (1974).

Petitioners argue that the Licensed Disclosure undercuts the effectiveness of their messages. Pet. Br. 37-38. But when seeking a preliminary injunction, petitioners did not support that speculation with any concrete evidence of harm. *Cf. Turner*, 512 U.S. at 668 (opinion of Kennedy, J.) ("unless we know the extent to which the must-carry provisions in fact interfere with protected speech, we cannot say whether they suppress 'substantially more speech than ... necessary' to ensure the [government goal]"). Without such evidence, there is no basis for finding any actual suppression of speech. *Compare McCullen v. Coakley*, 134 S. Ct. 2518, 2528 (2014) (bench trial that developed record of suppressed speech), *and Sorrell*, 564 U.S. at 561, 564-565 (similar), *with Zauderer*, 471 U.S. at 653 n.15 (rejecting challenge where there was no "factual basis for finding that Ohio's disclosure requirements are unduly burdensome").[39]

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[39] This case is unlike *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721 (2011), in which a campaign-donation-matching statute mathematically ensured that speech by one person would result in equal opposing speech, *id.* at 737-738, and in which there was direct evidence that the state law was causing people to forgo speech, *id.* at 744. Petitioners do not allege that the disclosure requirement will cause them to desist from their anti-abortion advocacy. Nor would such a claim be

Petitioners' challenge therefore rests mainly on two claims. First, they assert that the Licensed Disclosure applies "*at the very beginning* of a pregnancy center's interaction with expectant mothers." Pet. Br. 1 (emphasis added); *see id.* at 37 (alleging that clients will "see signs referring for free and low-cost abortions before even getting to the front desk or speaking with Petitioners' staff"); *id.* at 38. But that rests on a misconception. As petitioners admit (Pet. Br. 38), the Act does not require anything in the waiting room or at the outset of a patient visit. Petitioners may choose to give the notice in that manner. But they may alternatively choose to include the notice among other electronic disclosures or to hand the patient a printed notice whenever the clinic deems best. § 123472(a)(2). And many pregnancy centers' first interactions will have occurred long before patients are at the clinic—during phone calls or online interactions in which the disclosure need not be provided at all.

Second, petitioners repeatedly maintain that the law in effect requires them to refer patients for abortion. Pet. Br. 8-11. But the Licensed Facility Disclosure does not recommend abortion as an appropriate option for any patient. Nor does it recommend any provider of abortions. Indeed, it does not even state that the phone number given will lead to information on abortion providers—only information on an individual's eligibility for state-funding of a spectrum of services that includes abortion. Like the host of other

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plausible. The statute simply requires disclosure of the fact that public programs exist which fund prenatal care, family planning, and abortion for eligible women. Clinics could not reasonably contend that such a statement would make their own much more extensive and pointed communications ineffectual or counterproductive.

notice requirements governing medical clinics, the Licensed Facility Disclosure imposes no more than the minimally-necessary burden on petitioners to ensure that their patients have a chance to obtain further information about access to additional services if they wish to do so.

3. *Reed* Does Not Change the Analysis

Petitioners argue that the Licensed Disclosure is subject to strict scrutiny under *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Pet. Br. 28-31. As the United States correctly shows (U.S. Br. 19-20), it is not.

Reed considered a challenge to a law which "identifie[d] various categories of signs based on the type of information they convey[ed], then subject[ed] each category to different restrictions" concerning size and the times that the sign could appear. *Reed*, 135 S. Ct. at 2224. As relevant here, *Reed* explained that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227.

That analysis pertains to a law that "'on its face' draws distinctions based on the message a speaker conveys," or, more subtly, "defin[es] regulated speech by its function or purpose." *Reed*, 135 S. Ct. at 2227.[40]

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[40] *Reed* also explained that a law that is content-neutral on its face may be "considered content-based" if it "cannot be justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message ... convey[ed]." *Id.* (internal quotation marks omitted). The disclosure requirement at issue here is justified by the need to inform women of the potential availability of comprehensive, free or low-cost reproductive healthcare—which relates to the status of women visiting facilities that focus on providing family

The sign ordinance in *Reed* was content based under that definition because the legal duties of someone posting a sign could be determined only by examining the message on the sign. *See id.* at 2231 ("come election time, [the ordinance] requires Town officials to determine whether a sign is 'designed to influence the outcome of an election' ... or merely 'communicating a message or ideas for noncommercial purposes'"). Here, a clinic's legal duties depend on its status and actions: the license it holds and the services it provides.

Petitioners argue that the disclosure requirement is content based because "[t]he State has prescribed precise words that Petitioners must say." Pet. Br. 18. That theory would require courts to apply strict scrutiny to all disclosure requirements, regardless of the disclosure's purpose or context. It would require overruling this Court's many precedents applying lower levels of scrutiny to required disclosures. *See* pp. 19-21, *supra* (discussing *Zauderer*); U.S. Br. 20. And it would call into question countless federal, state, and local laws.[41] *Reed* contains no indication that it was intended to sweep aside so many of this Court's precedents or cast doubt on commonplace and familiar laws, and this Court has not interpreted *Reed* as doing any such thing. *See Expressions Hair Design*, 137 S. Ct. at

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planning or pregnancy-related services, not to the content of any clinic's speech. *See also* pp. 49-52, *infra* (discussing viewpoint discrimination).

[41] *See, e.g.*, 12 C.F.R. § 1026.1 et seq. (requirements for credit-solicitation disclosures); 49 U.S.C. § 32908(b) (required automobile fuel economy labels); 21 C.F.R. pt. 101 (food labeling requirements); 21 C.F.R. §§ 201.56, 201.57 (prescription drug labeling requirements); Cal. Health & Safety Code § 13220 (requiring building owners to post emergency procedures); pp. 42-33 & nn.33-37, *supra* (required healthcare disclosures).

1151 (remanding for consideration of whether a statute governing price-disclosures should be reviewed under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), or under *Zauderer*); U.S. Brief 20.

D. The Act Does Not Discriminate Based on Viewpoint

Petitioners argue that strict scrutiny is necessary because the disclosure requirement applies "only to licensed pregnancy centers that are pro-life," Pet. Br. 34, and is therefore viewpoint discriminatory in "its operational effect," *id.* at 31. That is certainly not true on the law's face; in fact, providing abortion services is an activity that can subject a clinic to the law. § 123471(a)(5). Nor would any possible disparate impact establish viewpoint discrimination. *See McCullen*, 134 S. Ct. at 2531 (a law that "'serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others'"); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994); U.S. Br. 31.

In any event, the record includes no evidence that the law applies only to facilities that oppose abortion. *Cf.* U.S. Br. 32-33. Nor do the Act's coverage criteria give reason to believe that the Act singles out anti-abortion providers. Petitioners note that the Licensed Facility Disclosure applies to clinics and not independent doctor's offices. Pet. Br. 32. But private physicians may support abortion, oppose abortion, or be indifferent. Coverage of free clinics rather than private physicians does not target anyone by viewpoint; instead it serves a narrow-tailoring purpose, because private physicians are less likely than free clinics to

serve patients who are uninsured and not yet enrolled in public programs.[42]

Nor is discrimination shown by the statute's application to clinics with a "primary purpose" of providing pregnancy care or its exemption for clinics that are Medi-Cal and F-PACT providers. Pet. Br. 33. "'States adopt laws to address the problems that confront them,'" and "'[t]he First Amendment does not require States to regulate for problems that do not exist.'" *McCullen*, 134 S. Ct. at 2532. The disclosure would serve little purpose at clinics that are Medi-Cal and F-PACT providers, because those clinics already are able to enroll women in full-service publicly funded programs on the spot. *See* J.A. 54-55 ("[t]he most effective way to ensure that women quickly obtain the information and services they need" is to require disclosures by facilities "that are unable to immediately enroll patients into the Family PACT and Medi-Cal programs"). The Act does apply to clinics with a "primary purpose" of providing "family planning services," § 123471(a), that are not capable of instantly enrolling patients in the public programs at issue, *see* pp. 9-10, *supra*. The coverage criteria reflect that the people

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[42] Petitioners also observe that the disclosure requirement will not apply to clinics operated by the federal government, or to clinics licensed under sections of the Health and Safety Code applicable to hospital-affiliated clinics, tribal clinics, community mental health centers, student health centers, clinics affiliated with medical schools, or clinics operated by employers for their employees. Pet. Br. 32. But this does not operate to carve-out clinics likely to have a pro-choice view. To the contrary, the exemption for hospital-affiliated clinics will include many operated by religious institutions whose beliefs lead them to exercise statutory rights not to provide abortions. *See* § 123420(c). In any event, clinics in the excluded categories are not comparable to covered clinics with respect to the law's targeted population of uninsured women seeking reproductive healthcare.

most likely to benefit from the disclosures concerning the availability of comprehensive, low-cost services related to family planning, pregnancy, or abortion are those who have sought family-planning or pregnancy-related services at clinics that will not themselves enroll women in the public programs.

Petitioners also suggest that this Court should find the Act viewpoint-discriminatory based on the bill sponsor's stated concern about some crisis pregnancy centers' activities. Pet. Br. 34. But what that legislator viewed as "unfortunate[]" was not that such clinics exist or advocate against abortion, but that they "pose as full-service women's health clinics" and use "intentionally deceptive advertising and counseling practices [that] confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care." J.A. 39. Concern about deception is not the same as antipathy toward advocacy.

Petitioners' reliance (Pet. Br. 34-37) on *Sorrell v. IMS Health Inc.* is misplaced. In *Sorrell*, the legislative record evidenced an express intention to shield doctors from particular speakers delivering particular kinds of speech. 564 U.S. at 576-577. Here, the Act has neither the intent nor the effect of shielding women from any message or preventing petitioners' speech. Instead it ensures that, regardless of what petitioners choose to say, pregnant women will receive, from the State, certain minimal information that allows them to acquire more information if they wish.

In rejecting the conclusion that California's law was motivated by antipathy towards religious, anti-abortion viewpoints, the district court here reached

the same conclusion as every other court that has considered the issue.[43] That conclusion would be correct in any procedural posture, and is all the more correct given the more stringent standard that this Court has indicated applies to proof of discriminatory purpose in the context of requests for preliminary relief. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

E. The District Court Properly Denied Preliminary Injunctive Relief Under Any Level of Scrutiny

Regardless of the First Amendment level of scrutiny that applies, the Licensed Facility Disclosure is constitutional, given its narrow tailoring (pp. 28-30, *supra*) and minimal burdens (pp. 39-40, 42-47, *supra*), and the State's compelling interest in ensuring that a particularly vulnerable population can make prompt, fully informed decisions. Under these circumstances, the district court did not abuse its discretion, *see Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004), in denying petitioners' motion for preliminary relief.

Petitioners summarily suggest alternative approaches that would excuse licensed facilities from

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[43] *See* Pet. App. 64a-65a, 68a (district court); *id.* at 20a-22a (court of appeals); *A Woman's Friend Pregnancy Res. Clinic v. Harris*, 153 F. Supp. 3d 1168, 1195 n.11 (E.D. Cal.) ("the record does not suggest the State's rationale for the Act was to discriminate against a certain viewpoint"), aff'd 669 Fed. App'x 495 (9th Cir. 2016), pet. for cert. pending No. 16-1146; Pet. Br. 4a (opinion in *Scharpen Found. Inc. v. Harris*, No. RIC1514022 (Riverside Super. Ct. Oct. 30, 2017)); *see also LivingWell Med. Clinic, Inc. v. Harris*, 2015 WL 13187682, at *11 (N.D. Cal.) (recounting the legislative concerns underlying the Act), aff'd, 669 Fed. App'x. 493 (9th Cir. 2016), pet. for cert. pending, No. 16-1153; *Mt. Right To Life v. Harris*, 2016 WL 3883923, at *5 (C.D. Cal.) (finding no evidence of improper purpose), aff'd 692 Fed. App'x 807 (9th Cir. 2017), pet. for cert. pending, No. 17-211.

any role in helping low-income women learn about full-service government-funded options. Pet. Br. 55-57. Petitioners' present record, which consists only of their verified complaint, does not support their contentions about less burdensome ways to achieve the statute's purposes.[44]

Promotional messages posted at government-funded full-service providers or on government health program websites (Pet. Br. 56) would not advance the State's interest in reaching women who do not know about the existence of, or the aid available from, government health programs. Neither would general advertising campaigns (Pet. Br. 55-56) suffice, as evidenced by the high number of people who are eligible for publicly funded healthcare but remain unenrolled despite extensive marketing and outreach efforts. *See* pp. 5-6 & n.10, *supra*. As *Riley* illustrates, the government must sometimes undertake its own publicity campaign rather than enlist private parties to disclose facts. 487 U.S. at 799-800. But in *Riley* any decreased effectiveness of the alternative means of communication would result only in people donating to a charity that they would otherwise have skipped. The consequences of a less effective message here would be far more severe, *see* pp. 2-4 & nn.3-6, *supra*, and the First Amendment does not require reliance only on less effective alternatives when urgent matters of life and health are at stake.

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[44] When reviewing a lower court's decision on preliminary injunctive relief where "the underlying constitutional question is close," it is appropriate to affirm and "remand for trial on the merits." *Ashcroft*, 542 U.S. at 664-665. Proceedings on the merits would "permit the parties to develop a more thorough factual record," and "allow the District Court to resolve any factual disputes," *Turner*, 512 U.S. at 668 (opinion of Kennedy, J.), as is proper before this Court passes definitively upon the constitutional validity of a law.

Petitioners argue (Pet. Br. 54-55) that the State could achieve its purposes by simply enforcing laws against fraud, without requiring the clinics to make the required disclosures. But the State has vital interests in helping a woman to avoid health risks and missed opportunities to control her life, whether resulting from affirmative deception or from mere confusion and lack of information. Petitioners' proposal for aggressive policing of the advertising and messaging of licensed, limited-service clinics could also insert the State into the content of the clinics' speech far more extensively than the approach taken here.[45] "When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more." *McCullen*, 134 S. Ct. at 2532.

A truly minimal disclosure—two sentences and a phone number—satisfies women's vital informational needs in a way that neither interferes with nor intrudes upon any clinic's speech. Indeed, the disclosure serves a purpose that petitioners acknowledge as valuable: allowing women to "know the facts and be fully informed."[46] If a woman visiting a limited-service

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[45] When San Francisco passed an ordinance targeting "'untrue or misleading'" statements concerning pregnancy-related services, one of Petitioners' amici sued. The amicus argued that the law was subject to and failed strict scrutiny, *see First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1270, 1273 (9th Cir. 2017), pet. for cert. pending, No. 17-1087, in part because it imposed a "substantial burden" on speech, *see* Reply Br. of Appellant, *First Resort*, 2015 WL 9267259, at *19.

[46] Fallbrook Pregnancy Resource Center, Abortion, http://www.fallbrookprc.com/Your-Options/Test-1 (last visited Feb. 19, 2018); *see id.* ("When faced with an unintended pregnancy everyone wants to give their opinion about what you should do. But it is YOUR decision, and no one should decide for

clinic determines that the advice and services she is provided there fully suit her needs, the required disclosure will be just another government notice, perhaps seen, but not acted on. But if she determines that she needs additional, neutral information to make decisions, that she wishes to consider services that the private center does not provide, or that she would simply feel better served by a publicly-funded, full-service clinic, the disclosure gives her notice of those options. In that circumstance, the notice allows a woman, in her judgment and discretion, to supplement the information and services she receives from the private, limited-service clinic should she wish. The First Amendment does not bar the State from making sure she knows she may do so.

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you."); Pregnancy Care Clinic Home Page, http://www.unplannedparenthood.org (last visited Feb. 19, 2018) ("[W]omen have a right to make their own decisions about the outcome of their pregnancy and their sexual health.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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